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## INTRODUCTION

Each increment in the state's ability to intrude into the lives of citizens is in fundamental conflict with continued individual freedom. Increased social controls narrow the limits of individual action and are accomplished only at the expense of individual freedom. While people appear interested in creating a safe and orderly society, people nevertheless do not want to forfeit their individual rights. Nowhere is this more obvious than in the practical conflict between crime prevention, and personal liberty and privacy.

To combat crime, society requires more police power and more order, with less regard for personal liberty and privacy. On the other hand, the preservation of individual freedom requires less police interference and greater emphasis on personal liberty and privacy. It is obvious that society must balance; that society cannot abolish the police and other law enforcement agencies in an effort to preserve individual rights and liberties without signalling the demise of that ordered society. Nor can society impose so many restrictions upon the police that they will become practically powerless to prevent crime and apprehend criminals.

An important aspect of crime prevention is the ability of the police to stop persons who are reasonably suspected of being enaged in, or about to engage in, criminal activity.[1] This practice, which has been labelled "stop and frisk,"[2] is not new to our society.[3] It is an

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1. Kuh, *In-Field Interrogation: Stop, Question, Detain and Frisk*, 3 CRIM. L. BULL. 597, 602 (1967).

2. "Stop and frisk" is a phrase used to describe police procedures for detaining reasonably suspicious persons and allows for a pat-down, of the suspect's outer clothing, for weapons if the officer has reason to fear for his safety. This practice was officially recognized as constitutional by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968).

3. The police power to detain and question is as old as the common law of England. "Early case holdings and statutes empowered the nightwatch of each town to detain 'suspicious nightwalkers' until the morning at which time the watchman would either release or arrest the suspect. . . ." Comment *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. C. & P.S. 532 (1967), *citing* HALE, PLEAS OF THE CROWN 88, 97 (Wilson ed. 1800) and 2 HAWKINS, PLEAS OF THE CROWN 164, 173 (7th ed. 1795).

accepted procedure for an officer to stop a suspicious-looking person for questioning and to search that person for weapons if the officer has reason to fear for his safety. However, because of the intrusive nature of the stop, an orderly yet free society demands definite guidelines for police and citizens. These definite guidelines make it possible for courts to regulate those officers who exceed the bounds of proper police conduct and infringe on individual rights.

Guidelines for stop and frisk proceedings were established by the Supreme Court in *Terry v. Ohio*.[4] The Court, balancing personal liberty and privacy interests with crime prevention concerns, determined that a stop must not only be brief[5] but also predicated on "reasonable suspicion."[6] These strictures were accepted and faithfully adhered to—until recently. The United States Supreme Court in *Michigan v. Summers*[7] held that a search warrant[8] implicitly carries with it the authority to detain occupants of the premises for the length of the search. Although the Court began its reasoning by citing *Terry* and applicable stop and frisk rationale, the Court soon parted ways and justified Summer's detention although it was unsupported by *Terry*'s reasonable suspicion standard.[9] The Court's new balance between freedom and order is a drastic change from the balance struck in *Terry*. *Summers* all but eliminates *Terry*'s reasonable suspicion requirement, while extending the briefness requirement of a valid stop. Yet, both of these are requisite elements of a valid stop. This new balance not only violates established stop and frisk law, but is inconsistent with established search warrant law.

The right to detain occupants has never been implicit in a search warrant. Search warrants are directed towards property rights and

4. 392 U.S. 1 (1968).

5. The language in *Terry* emphasizes that a stop should be brief. Terry v. Ohio, 392 U.S. at 26, 33, 34.

6. "Reasonable suspicion is usually defined as reasonable, articulable grounds for suspecting that a crime was committed and that the person detained was involved. An officer cannot engage in a stop and frisk whenever he has a hunch that the suspect is engaged in criminal activity. If the officer wants to stop and frisk a suspect, the officer must have "specific facts from which [he] can reasonably infer" that the individual is engaged in criminal activity. Good faith and inarticulate hunches are not enough for even the temporary detention of a stop. Adams v. Williams, 407 U.S. 143, 158 (1972).

7. 452 U.S. 692 (1981).

8. A search warrant is an order in writing, issued by a magistrate, directed to a sheriff, authorizing the sheriff to search for and seize any property that constitutes evidence of a crime, contraband, or the fruits of a crime.

9. Michigan v. Summers, 452 U.S. 692 (1981).

not towards personages.[10] A search warrant which does not mention or describe a particular person provides probable cause only to search the premises but generates no probable cause to detain or arrest the occupant.[11] The right to detain a person must be based on either probable cause to arrest[12] or on reasonable suspicion as in the *Terry* context.[13] Neither of these are found in *Summers*. Thus the *Summers*' balance of freedom and order is an entirely different balance from that reached under *Terry* or established search warrant law. The questions arise whether *Summers* is actually governed by *Terry*, as the Court implies, and whether it should be. The immediate concern is two-fold: whether the *Summers*' decision will foster the potential abuse of a stop[14] that *Terry* sought to eliminate, and whether probable cause as an element in a search warrant no longer has legal significance.

The drafters of the Constitution were aware of the conflict between crime prevention and individual freedom. The fourth amendment was born of their efforts to balance these seemingly diametric values. This note will discuss the fourth amendment's requirement of probable cause before an officer can intrude into a citizen's privacy. Second, it will show the Court's recognition of the investigatory stop as an exception to the probable cause requirement. Third, the note will discuss the fourth amendment's requirements for a search warrant. And last, the note will discuss the effect of the Supreme Court decision in *Michigan v. Summers* on the fourth amendment's established balance of order and freedom. The note will conclude that the *Summers* detention should not be permitted since the decision is a drastic change from established investigatory stop and search warrant law. If, however, the Supreme Court feels compelled to allow such a detention, the citizen should be afforded maximum protection of his rights by limiting the length of the detention.

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10. The warrant provisions relate, not to the person, but to the property. A warrant may be obtained for a search of specific property without showing that the owner is necessarily suspected of criminal activity. Zurcher v. Stanford Daily, 436 U.S. 547, 555-59 (1978), *reh'g denied*, 439 U.S. 885 (1978).

11. *See* Ybarra v. Illinois, 444 U.S. 85 (1979), where "the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protection possessed individually by the tavern's customers." *Id.* at 92. *See also infra* note 110.

12. U.S. CONST. amend. IV.

13. Terry v. Ohio, 392 U.S. 1 (1968).

14. *Terry* sought to eliminate the unnecessary intrusions upon personal liberty, privacy, and autonomy, brought about by dragnet stops, stops based on mere hunches, and "unreasonable" searches and seizures.

## THE REQUIREMENT OF PROBABLE CAUSE

The Framers of the Constitution balanced the opposing interests of freedom and order by establishing a standard which allowed reasonable crime prevention techniques without sacrificing significant personal freedom. The result was the fourth amendment to the United States Constitution with its standard of "probable cause."[15] This amendment was enacted to prevent the intrusions associated with the use of general warrants[16] and writs of assistance.[17] While the amendment did much to preclude the use of such general warrants and writs, it has been criticized for the vagueness of the phrase "unreasonable searches and seizures."[18] Unfortunately, the Constitution does not define "unreasonable searches" and, in our methodology, there is no adequate test to provide such a determination. To ascertain the nature of the activities contemplated by the fourth amendment under the term "unreasonable searches and seizures," it is necessary to review the controversies on the subject.

Prior to the amendment the colonies followed the English practice of "issuing writs of assistance to revenue officers and empowering them, in their discretion, to search suspected places for smuggled goods."[19] The writs were valid anytime of the day or night and for any premises, whether it was a home or a business.[20] Since the execution of the writ was in the discretion of the officer, he had virtually unlimited power over all persons and places. The potential for

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15. The fourth amendment, ratified in 1791, states that:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"Probable cause" is the existence of facts and circumstances that would lead a person of reasonable caution to believe that a crime has been committed. State v. Kolb, 239 N.W.2d 815, 817 (N.D. 1976).

16. General warrants were issued by the Secretary of State, without naming the person, for searching private houses for the discovery and seizure of books and papers that might to used to convict their owner of the charge of libel. Boyd v. United States, 116 U.S. 616, 625-26 (1885).

17. Writs of assistance authorized the search for smuggled goods or goods on which the duties were not paid, and allowed entry in order to search any suspected vaults, cellars, or warehouses for such goods. *Id.* at 623, 625.

18. "It is quite extraordinary that in a country which prides itself on individual liberty these should be so obscure and ill-defined." Devlin, *The Police in a Changing Society*, 57 J. CRIM. L., C. & P.S. 123, 128 (March 1966).

19. Boyd v. United States, 116 U.S. 616, 625 (1885).

20. *See supra* notes 16 and 17.

abuse was great and such potential was realized in many instances.[21] The fourth amendment was written in light of this history and prohibits such discretionary and unreasonable searches and seizures by demanding probable cause before the issuance of any warrant. The fundamental core of the fourth amendment is the protection of individual liberty and privacy from arbitrary and unreasonable police intrusion.[22]

Difficulty inevitably arises in distinguishing between reasonable and unreasonable intrusions. The recurring question of reasonableness must find its resolution in the facts and circumstances of each case. One obvious intrusion into liberty and privacy is the intrusion of an arrest. A number of courts define "unreasonableness" on the basis of the strict technicalities of arrest law.[23] Since arrests must be based upon reasonable grounds that the suspect committed the crime, the "reasonableness" of the arrest is determined by the "reasonableness" of the grounds for the arrest. If the suspect is arrested on probable cause, the arrest is valid and the fourth amendment is not violated. However, if the suspect is arrested without probable cause, the arrest is illegal and constitutionally "unreasonable."

This seemingly obvious maxim offered by arrest law was upset by the Supreme Court's recognition of the constitutionality of investigatory stops.[24] "Unreasonableness" could no longer be defined

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21. Boyd v. United States, 116 U.S. 616, 625 (1885), "[Wilkes] . . . was the pioneer in the contest which resulted in the abolition of some grevious abuses . . . . Prominent and principal among these [abuses] was the practice of issuing general warrants . . . ." *Id.*

22. Wolf v. Colorado, 338 U.S. 25, 27 (1949). *See also* Davis v. Mississippi, 394 U.S. 721, 726-27 (1969). "Nothing is more clear than the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions'."

23. *See* United States v. Thomas, 250 F. Supp. 771, 780 (S.D.N.Y. 1966).

24. The first case in which the Supreme Court explicitly recognized the concept of stop and frisk was *Terry v. Ohio*, 392 U.S. 1 (1968). Prior to *Terry*, the Supreme Court had not considered the validity of temporary detentions based on a suspicion of less than probable cause. However, the issue had been posed and the groundwork established earlier when the Court, in *Brinegar v. United States*, 338 U.S. 160 (1949) (Burton J., concurring), said:

> It is only by alertness to proper occasions for prompt inquiries and investigation that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in enforcement of the law and this requires affirmative action not only when there is reasonable ground for arrest or probable cause for a search but when there is reasonable ground for an investigation.

*Id.* at 179. The Supreme Court restated the same idea, after *Terry*, when they said:

> The fourth amendment does not require a policeman who lacks the

strictly on arrest law. Instead of two categories, innocent police contact[25] and arrests, there are now three categories—contact, stop, and arrest. Instead of one clear dividing line between mere contact and arrests, there are now two hazy ones: one separating mere contact from an investigatory stop and the other separating the investigatory stop from the traditional arrest. The question immediately arises as to where the investigatory stop fits into the fourth amendment.

A few attorneys have argued that the fourth amendment does not apply to simple investigatory stops.[26] The argument is based on the premise that investigatory stops are only minor intrusions on the suspect's rights of privacy and autonomy. These attorneys argue that since this police conduct does not attain the level of a technical arrest or a fully developed search, fourth amendment principles are not applicable. But, this argument attempts to alter the balance between freedom and order already established by the Constitution. Consequently, the argument fails for two reasons. First, the fourth amendment uses the word "seizure" and does not restrict its application to technical arrests only.[27] The Supreme Court significantly noted that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person and the fourth amendment governs such actions."[28] Thus, the fourth amendment cannot be viewed solely as a limitation on "arrest" law. The fourth amendment applies any time the individual is detained and is not limited to the instances of actual formal arrest.

Second, to argue that the fourth amendment does not apply to simple investigatory stops is to misconceive the purposes of the fourth

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> precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.

Adams v. Williams, 407 U.S. 143, 135 (1972).

25. "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." Terry v. Ohio, 392 U.S. at 34 (White, J., concurring).

26. *See, e.g.*, Davis v. Mississippi, 394 U.S. 721, 726 (1969), where the attorney's argument can be inferred from the Court's language: "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is to fundamentally misconceive the purposes of the Fourth Amendment."

27. The fourth amendment does not use the word "arrest" at all. Instead, it uses the word "seizure", which is much broader than "arrest". Thus, a "stop" can fall within the ambits of the fourth amendment.

28. Terry v. Ohio, 392 U.S. at 16.

amendment.[29] It is clear that the fourth amendment was meant to prevent unwarranted intrusions upon the privacy and liberty of citizens, whether these intrusions are called arrests or investigatory stops.[30] *Terry* explicitly rejected the idea that the fourth amendment is inapplicable and not a limitation upon police conduct when that conduct stopped short of a technical arrest.[31] *Terry* held that when a suspect is detained, he is "seized"[32] and the fourth amendment becomes operative. With the recognition of *Terry*'s new "middle ground", the Supreme Court established a new balance between order and freedom. This new middle ground expanded the police power to detain suspects, yet it protected individual privacy interests by imposing fourth amendment safeguards.

The fourth amendment applies to all seizures, including seizures that involve only a brief detention short of traditional arrest.[33] But, the fourth amendment does not prohibit all seizures. It only prohibits unreasonable ones. The controlling standard for detentions then becomes one of reasonableness.[34] The courts should, therefore, emphasize the reasonableness of the search and seizure, instead of the strict technicalities of arrest law. Since both *Terry* and *Summers* involve detentions short of traditional arrest, they must both be bound by this standard. If courts follow this practice, it will be easier to develop workable rules for the guidance of police officers—both in the application and in court interpretations of those rules.

## INVESTIGATORY STOPS

### *Recognized Elements of a Valid Stop*

Despite the fourth amendment's explicit requirement of probable cause to protect against unreasonable seizures,[35] the investigatory stop is a recognized exception to the probable cause requirement. The in-

29. Davis v. Mississippi, 394 U.S. at 726.

30. *Id.* at 726-27.

31. The Supreme Court in *Terry* rejected the "inapplicability of the fourth amendment" idea, when they said, "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or 'full-blown search'." Terry v. Ohio, 392 U.S. at 19.

32. The Court stated that, ". . . whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, 392 U.S. at 16.

33. *See generally*, Terry v. Ohio, 392 U.S. 1 (1968); Davis v. Mississippi, 394 U.S. 721 (1969).

34. Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

35. U.S. CONST. amend. IV. *See supra* note 15 and accompanying text.

vestigatory stop permits the officer to "briefly detain"[36] an individual and make inquiries[37] if the officer reasonably suspects that the individual is engaged in, or about to engage in, some form of illegal activity.[38] Thus, a stop occurs whenever an officer uses authority to compel a person to halt or to stay in a certain place.[39] If the person is under a "reasonable impression" that he is not free to leave the officer's presence, a "stop" has occurred.[40]

Once a stop has occurred, the officer has an immediate interest in assuring himself that the person stopped is not armed.[41] If the officer reasonably believes that the suspect is armed and presently dangerous, he is entitled to "frisk" the suspect.[42] A frisk is a carefully limited search of the outer clothing of the suspect in an attempt to discover weapons which might be used to assault the officer.[43] An authorized frisk includes only a search for a dangerous weapon and "by no means [includes] a search for contraband."[44] As discussed later,[45] it is in this regard that the *Summers* decision could radically extend the principles established in *Terry*. A *Terry* frisk is limited to a weapon search while *Summers* could reasonably lead to a search for contraband.

The practice of "stop and frisk" was not recognized or adopted by the Supreme Court until its decision in *Terry*.[46] In this decision the Court emphasized that the right to seize a person for questioning or any other purpose, absent probable cause for arrest, is a very

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36. "Briefly" means a limited duration, only long enough to ask a few pertinent questions. Terry v. Ohio, 392 U.S. at 34 (White, J., concurring).

37. Officer may demand of the suspect his name, address, and an explanation of his actions. *See, e.g.*, IND. CODE ANN. § 35-3-1-1 (Burns 1979), ILL. ANN. STAT. Ch. 38, § 107-14 (Smith-Hurd 1980), WIS. STAT. ANN. § 968-24 (West 1971).

38. In *Terry*, the Court expressly declined to decide whether facts not amounting to probable cause could justify an "investigatory seizure" short of an arrest, but approved a limited stop and inquiry. 392 U.S. at 19 n.16.

39. United States v. Wylie, 569 F.2d 62, 67 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978) (quoting Washington Metropolitan Police Department regulations).

40. *Id.*

41. Terry v. Ohio, 392 U.S. at 23.

42. *Id.* at 23-24.

43. *See id.* at 39-30.

44. *Id.* at 16 n.12.

45. *See infra* note 178 and accompanying text.

46. "Stop and frisk", however, was not devised by the Supreme Court in *Terry*. Both at the common law, referring to the statutory and case law background of England and the American Colonies, and under decisional laws of various states, the police have possessed a clear, but narrowly defined, power to stop and question a suspect. United States v. Thomas, 250 F. Supp. 771, 782-83 (S.D.N.Y. 1966).

limited one. There are three criteria which must be satisfied in order to justify this limited right to stop or seize a person. First, the stop must be based on a "reasonable suspicion"[47] that the detained person had committed, or is about to commit, a crime. Second, the stop must be brief.[48] Third, the questions must be limited to obtaining information relating to the detained person's conduct.[49]

To satisfy the reasonable suspicion criteria of a valid stop,[50] the officer must reasonably suspect that a crime has been committed and the detained individual is involved in the criminal activity. This is an objective standard. The facts must be such that a "reasonable" person would entertain such a suspicion. The *Terry* Court stated that a less stringent standard would result in intrusions upon constitutionally guaranteed rights.[51] If police stop and frisk an individual, they must have specific facts from which they can reasonably infer that the individual is engaged in criminal activity. Moreover, every officer who conducts a stop must be prepared to cite those specific facts which led him to believe that the stop was justified.[52]

This objective standard eliminates inarticulate hunches and good faith suspicions[53] as legitimate bases for a stop. Such hunches and suspicions would not be enough to convince the reasonable man that a stop would be appropriate. Thus the objective standard would not be satisfied. It is for this reason that *Summers* is such an affront to constitutional principles. *Summers* abandons *Terry*'s objective stan-

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47. *See supra* note 6.

48. Case law is virtually unanimous in requiring that stops be "brief;" however, case law is also unanimous in not saying what "brief" means. MODEL RULES FOR LAW ENFORCEMENT: STOP AND FRISK, Rule 301 and comment (Police Foundation 1974).

49. *See infra* notes 62-65 and accompanying text.

50. *See infra* note 53.

51. Terry, 392 U.S. at 22. *See also* Carroll v. United States, 267 U.S. 132 (1924). The rights of liberty, privacy, and the right to move freely about without undue unfluence is a natural right of all U.S. citizens. These rights are guaranteed to all citizens under the Constitution.

52. Terry v. Ohio, 392 U.S. at 21. "[I]n justifying the particular intrusion, the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id. See also* Sibron v. New York, 392 U.S. 40, 64 (1968).

53. A "reasonable suspicion" is a "quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand." "Mere suspicion" is the "apprehension of criminal activity without proof or upon slight evidence." "Good faith suspicion" is an honest belief that criminal activity is at hand, but is a "concept of (one's) own mind and inner spirit and, therefore, may not be conclusively determined by (one's) protestations alone." *See* BLACK'S LAW DICTIONARY 623, 1138, 1298 (5th ed. 1979).

dard when it detains the occupants of the premises. The decision to stop is seemingly left entirely to the whim of the police officer with its concomitant potential for fostering the unconstitutional intrusions anticipated in *Terry*.[54] Detention of citizens based on hunches and without reasonable suspicion is diametrically opposed to the constitutional rights of personal privacy, liberty, and freedom of movement.[55] To combat this, the Supreme Court in *Terry* fixed the standard at a "reasonable suspicion" that a criminal had been or is about to be committed.

While the standard of "reasonable suspicion" involves more than inarticulate hunches and suspicions, it entails less than the arrest standard of "reasonable cause to believe."[56] If the "reasonable suspicion" of a stop and the "reasonable cause to believe" of an arrest were defined the same way, an arrest could always be made under traditional arrest law and there would be no need for a procedure allowing brief detentions for investigation based on a lesser standard. It is true that both standards require a balancing of the public interest in crime prevention and the individual interest in privacy, liberty and freedom of movement.[57] Yet, a brief on-the-street seizure requires a lower standard of suspicion than a formal arrest, since the former is shorter and less conspicuous than a full arrest, as well as less humiliating to the person.[58] But the objective reasonable man standard remains.

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54. *See supra* notes 14 and 51.

55. Freedom of movement is the "right of a citizen to move freely about without any undue restraint or interference by law enforcement agencies." Comment, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L., C. & P.S. 532, 534 (1967). *See also supra* note 51.

56. An arrest must be based on reasonable cause for *believing* that a crime was committed. A stop is based on a reasonable cause for *suspecting* that a crime was committed. Note, *Criminal Procedure: Police Power to Stop, Question and Frisk Suspicious Persons*, 1 SUFFOLK U.L. REV. 105, 108 (1967).

57. "[T]he requirement of probable cause is a compromise for accomodating the opposing interests of the public in crime prevention and detection, and of individuals in privacy and security. The same compromise is not called for it all situations, and thus this balancing process should take account of precisely what lies in the balance of a given case. Because one variable is the degree of imposition on the individual, it may be postulated that less evidence is needed to meet the probable cause test when the consequences for the individual are less serious." LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 54 (1968-69) [Hereinafter LaFave, *"Street Encounters"*].

58. Compared to a traditional arrest, an investigatory stop is for a shorter period of time, less damaging to one's reputation, less conspicous and less humiliating, and not recorded as an arrest. LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 311, 358-59. *But see* PAULSEN, THE PROBLEM OF POLICE INTERROGATION, 28 (A.L.I. 1961). Arguably, the fact that a deten-

In any stop situation, the facts still must support a reasonable possibility that the detained person has committed or is about to commit a crime. *Summers* attempts to circumvent this inquiry by justifying the detention solely on the basis of a search warrant. But, a search warrant only looks at the location of contraband, and not the person who put it there.[59] Unfortunately for *Summers*, every such constitutional balancing of privacy rights must confront the issue of "reasonable suspicion." There can be no exceptions.

The second criterion for a valid detention is that the investigatory stop be "brief." While case law is virtually unanimous in requiring that stops be brief, case law is also unanimous in not saying what "brief" means.[60] A few states have set statutory temporal limits on the extent of detentions[61] but most have not. Without a statutory interpretation of "brief," courts are forced to consider other factors. The most commonly used factor is whether the questioning during the stop was limited to inquiries designed to allay the suspicions and fears of the officer.[62] Consequently, the briefness of the stop is analyzed in terms of the limited scope of the questioning.

The length and scope of the questioning during a stop must be "strictly tied to and justified by the circumstances which rendered its initiation permissible."[63] In other words, the officer is authorized to investigate only the facts which gave rise to the suspicion.[64] He may ask the suspect to give his name, address, and a satisfactory

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tion may be limited to a few hours or may not result in a criminal record "is irrelevant to the goal of achieving freedom to go about and do what one pleases, subject to interruption only upon reasonable cause."

59. *See supra* notes 10 and 11 and accompanying text.

60. *See supra* note 48.

61. Only five states have set definite time limits on the duration of a stop. These limits range from thirty minutes to four hours. *See*, DEL. CODE ANN. tit. 11, § 1902 (1979); MONT. REV. CODE ANN. § 46-5-402(4) (1979); NEV. REV. STAT. § 171.123 (1979); N.H. REV. STAT. ANN. § 594.2 (1974); R.I. GEN. LAWS § 12-7-1 (1956). Approximately fifteen other states have adopted stop and frisk statutes, but the duration set is either "temporarily" or "reasonable." *See e.g.*, IND. CODE ANN. § 35-3-1-1 (Burns 1979); ILL. ANN. STAT. ch. 38 § 107-14 (Smith-Hurd 1980). The remainder, and by far the majority, of the states have remained silent on the subject.

62. The officer may question or frisk a suspect regarding weapons if the officer has reason to fear for his safety. *See supra* note 2.

63. Terry v. Ohio, 392 U.S. at 19, *citing* Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

64. For example, if a police officer sees a jaywalker, the jaywalker can be detained and questioned concerning his conduct. However, without additional suspicious facts, the officer cannot justifiably detain the suspect while checking for other unrelated warrants. The officer is authorized to investigate only the facts which gave rise to the suspicion.

explanation of his actions.[65] Once that information is obtained the stop is over. In the circumstances of *Summers*, this should mean that the occupants should only be questioned about their presence at the search warrant site. The occupants should not be detained longer than is reasonably necessary to accomplish such questioning.[66] This questioning is not intended to elicit a confession but only to obtain information relating to the detained person's conduct. Since the detention is justified by a reasonable suspicion concerning the suspect's conduct, the justification for the stop ceases once this suspicion has been allayed.

On the other hand, if the cursory questioning does not dismiss the officer's suspicion,[67] a more thorough investigation is authorized.[68]

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65. Name, address, and an explanation of the suspicious actions are the most acceptable and widely-used basis for on-the-street investigatory questioning. It has also been held that a brief stop of a suspicious individual to determine identification or to maintain the status quo momentarily while obtaining more information may be most reasonable. *See* Adams v. Williams, 407 U.S. 143, 146 (1972). If the suspect provides unsatisfactory answers to legitimate police inquiries, the officer is usually allowed more time for questioning. *See e.g.*, The Uniform Arrest Act, *reprinted in* Warner, *The Uniform Arrest Act*, 28 VA L. REV. 315, 343-47 (1942). This Act provides for questioning up to two hours if the suspect answers unsatisfactorily.

66. The questions must be aimed at information relating to the suspect's suspicious conduct and toward allaying the officer's suspicion concerning such conduct. *See supra* note 37.

67. Examples which would authorize further investigation include:

1) If the suspect gives an account of himself which adds to the prior suspicion and this presents the officer with a situation in which he may make a lawful arrest;

2) If the responses are inconsistent with the prior knowledge of the officer;

3) If the responses are internally inconsistent;

4) If the responses are inherently incredible; or,

5) If the responses are inconsistent with observable facts.

LaFave, "*Street Encounters*", *supra* note 57, at 93 n.276.

68. A more thorough investigation may include a longer questioning period. *See e.g.*, *infra* note 72 and accompanying text. A more thorough investigation may also include more intensive questioning provided such questioning is related to the suspicious conduct, and perhaps even questioning at the station.

No cases have been found that sanction questioning at the station under a stop proceeding. In fact, most cases discourage it since such questioning can readily assume the characteristics of a formal arrest. However, the courts have recognized the propriety of moving a suspect for convenience or safety. *See e.g.*, United States v. Richards, 500 F.2d 1025 (9th Cir. 1974) (stopped on an airport runway). People v. Courtney, 11 Cal. App. 3d 1185, 90 Cal. Rptr. 370 (1970) (an angry crowd gathered at the scene). A two hour detention on a street corner could be inconvenient as well as uncomfortable. There seems to be sufficient grounds for inferring that the suspect could be taken to a nearby station for convenience in questioning. However, the questioning still must retain "stop" qualities and cannot adopt the characteristics of a formal arrest.

In *Terry* a further intrusion was allowed after Terry's "mumbled response to the officer."[69] In *United States v. Richards*,[70] a further detention was justified following unsatisfactory responses to the officer's inquiries. Also, the Uniform Arrest Act[71] allows detention and further questioning for as long as two hours if the suspect provides unsatisfactory answers to officer inquiries.[72] The statutes simply give an officer more time to elicit a response should the suspect render evasive answers. This is certainly necessary since the stop has no protective value if police are required to abandon any further questioning simply because the suspect will not cooperate.

It should be emphasized, however, that the statutory provisions do not mandate a response from the suspect. States with detention statutes do not provide "penalties" for refusing to answer. Rather, the statutes are directives to the detaining officer. [73] The majority view is that refusal to answer furnishes no basis for arrest.[74] The refusal is merely one factor the officer will consider, along with the evidence which gave rise to the initial suspicion, in determining whether there are grounds for arrest.[75] Thus, in *Summers*, had Summers failed to cooperate, the police would have been justified in a prolonged detention. However, Summers was cooperative. To be con-

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69. 392 U.S. at 7. When the man "mumbled something" in response to his inquiries, Officer McFadden grabbed Terry and patted down the outside of his clothing. *Id.* "We cannot say his decision . . . to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination . . . ; the record evidences the tempered act of a policeman who . . . had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so." *Id.* at 28.

70. 500 F.2d 1025 (9th Cir. 1974).

71. The Uniform Arrest Act was proposed by the Interstate Crime Commission in 1942. Three states have adopted the Act, at least in part: Deleware, Rhode Island, and New Hampshire. The Act is reprinted in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-47 (1942).

72. Two hours is a rather long time to stand on the street and question a suspect. It is feasible that any such further questioning may take place in the squad car or at the police station, provided the detention does not assume "arrest-like" qualities. *See supra* note 68.

73. The officer may use a refusal to answer as grounds for further detention and questioning. In a majority of jurisdictions, refusal to answer may even be a factor adding to probable cause for arrest. *See infra* note 74 and accompanying text.

74. LaFave, "*Street Encounters*", *supra* note 57, at 106-107. *See also* MODEL RULES FOR LAW ENFORCEMENT: STOP AND FRISK Rule 304 (Police Foundation, 1974). It should be noted that there is a split of authority. The majority allows refusal to answer to be considered with other factors as an element adding to probable cause. A strong minority, however, contends that refusal to answer may not be considered as an element of probable cause to arrest; it is cause for further investigation of the circumstances surrounding the stop.

75. *See supra* note 73, and authority cited therein.

sistent with *Terry*, such cooperation cannot justify a subsequent prolonged detention.

Along with prolonged detentions, citizens should realize that the authority to stop necessarily carries with it the authority to use force against an uncooperative suspect. While most citizens abhor the use of force because of its obvious potential for excess, without such authority, the officer does not have the necessary means to accomplish the purpose for the stop. Yet, there are a number of safeguards to prevent flagrant police abuse. Authorized force is strictly confined to the act of detaining the suspect. There is no justification for or recognition of force to elicit a response. The authorized amount of force is only enough "reasonable force"[76] to detain the suspect but not enough to cause serious bodily harm to the person stopped.[77]

An officer may not stop anyone unless the officer is prepared to explain, with particularity, his reason for doing so.[78] The stopping and searching of a person is not authorized merely because he has a criminal record.[79] The stopping and searching of a person is not authorized merely because he is in the vicinity of a crime;[80] this must

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76. Most policy manuals have set guidelines on the use of force.

> An officer may use only such force as is reasonably necessary to carry out the authority granted by these Rules. The amount of force used to effect a stop shall not, however, be such that it could cause death or serious bodily harm to the person stopped. An officer must not use a weapon or baton to effect a stop. He may use his hands, legs, arms, feet or handcuffs.

MODEL RULES FOR LAW ENFORCEMENT: STOP AND FRISK, *supra* note 74, Rule 305(b).

> If a person resists or runs, reasonable force may be used to hold him . . . . Never use deadly force or force that may cause serious harm. The guideline is this: Where the clear need arises, hands, legs, feet, and handcuffs may be used. The use of guns, clubs, club substitutes, or mace is not allowed.

*Id.* at Rule 305 Commentary at 49 (quoting Cambridge Police Department Operations Procedures and Policies IV(D)(2), (3).

> If a suspect refuses to stop, the officer may use reasonable force, but only by use of his body, arms, and legs.

*Id.* (quoting New York City Combined Council of Law Enforcement Officials Policy Statement I(B)(1).)

77. *See supra* note 76.

78. *See supra* note 52.

79. In *Henry v. United States*, 361 U.S. 98 (1959), FBI agents were investigating a theft from an interstate shipment of whiskey. Henry was stopped because he was observed picking up cartons at a residence and because he was "suspected of some implication in some interstate shipments . . . ." *Id.* at 103. The Court held that the suspect's reputation will not justify a stop when all of the suspect's acts are outwardly innocent. "The fact that packages have been stolen does not make every man who carries a package subject to arrest." *Id.* at 104.

80. *See infra* note 114 and accompanying text.

be reinforced in *Summers* since *Summers* apparently authorizes detentions of persons who are merely on the premises. The questioning must proceed in the immediate area in which the stop took place.[81] Finally, the detention is authorized to last only long enough to ask those limited questions sanctioned by a statute or the common law.[82]

The recognition of investigatory stops has not undermined the balance of freedom and order established in the fourth amendment. It is true, the Supreme Court's balance in *Terry* was established to promote greater crime prevention techniques. But, this standard did not sacrifice freedom for the increased police power. The Supreme Court preserved the same level of personal privacy by maintaining the precise protective safeguards expressed in the fourth amendment.[83]

*Lingering Opposition to the Propriety of Investigatory Stops*

The United States Supreme Court decided that the fourth amendment's balance embodied in the investigatory stop was constitutionally permissible. Yet, arguments opposing the necessity and propriety of such stops continue to exist. The speculation is that the need for field interrogation and detention would disappear if we had more and better trained police officers.[84] However, a larger police force, by itself, would not be a significant deterrent to crime. Although the visibility of patrolmen is a deterrent to crime,[85] it would require a ubiquitous police force to prevent crime to the degree that stops are no longer necessary, and such is a physical and economic impossibility. The

81. During a valid stop, movement of the suspect within the general vicinity is permissible without converting the temporary seizure into an arrest. This power, however, is not unlimited. It must be effectuated by the exigencies of the situation. United States v. Richards, 500 F.2d 1025 (9th Cir. 1974) (stopped on an airport runway). People v. Courtney, 11 Cal. App. 3d 1185, 90 Cal. Rptr. 370 (1970) (an angry crowd gathered at the scene).

82. *See supra* note 37.

83. The Supreme Court stated that a less stringent standard than reasonable suspicion would result in intrusions upon constitutionally guaranteed rights. One can reasonably infer from this statement that the reasonable suspicion standard preserves such constitutionally guaranteed rights. Terry v. Ohio, 392 U.S. at 22.

84. Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, *in* POLICE POWER AND INDIVIDUAL FREEDOM (Sowle ed. 1962). The speculation is that in police work, as elsewhere, one generally gets no more than he pays for and that legislation of police power is a wholly inadequate substitute for responsible police fiscal and personnel policy. The chief disadvantages of field interrogation and detention are that they cost money and require the exercise of political and administrative statesmanship whereas enacting new arrest laws offers the illusion of doing something about crime without financial or political complications and has a natural appeal to political expendiency. *Id.* at 33.

85. Schwartz, *Stop and Frisk*, 58 J. CRIM. L., C. & P.S. 433, 452 (1967).

Supreme Court's reasoning in allowing the investigatory stops as a valid technique for intercepting reasonably suspicious persons is sound. It is a socially cogent policy to prevent crime rather than attempting to compensate crime's incalculable consequences.[86]

The second argument against stops is the harassing effect these "intrusions" have on the minorities.[87] Minorities and slum residents are said to be the main victims of stop proceedings.[88] Arguments stressing this harassment factor emphasize the extensive loss of personal liberty and privacy and conclude that the stop rarely should be allowed.[89]

Theoretically, this harassment argument poses very little threat to the continued existence of the stop. There are too many countervailing safeguards that justify the stop. The requirement of reasonable suspicion, not just mere suspicion, restricts the possibility of harassment. The necessity of preventing crime in inner city high crime areas combats the harassment argument. Furthermore, the relatively minor intrusion imposed on the suspect when a stop occurs also offsets the harassment argument. Theoretically, the safeguards and necessities promoted by these three justifications override the harassment factor. In reality, however, harassment can still occur. The fear of harassment is valid and cannot be eliminated by alleged departmental safeguards. The problem of harassment, though, is not in the stop per se; it is in the individual police officers. Such officers will continue their harassing activities regardless of the stringency of the laws.[90] But, an effective law enforcement tool should not be completely

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86. It is virtually impossible to "compensate" the victim of a crime. One cannot be compensated for indelible scars on emotions, personality, dignity, or self-esteem. Monetary values cannot adequately replace the intangibles lost pursuant to a murder, robbery, or rape. Similarly, imprisoning the culprit may superficially soothe the victim's longing for revenge, but it does not restore the victim to his pre-crime position. For these reasons, crime prevention should be preferred as opposed to post-crime compensation.

87. A Michigan State survey found that both minority groups and persons sympathetic to minority groups throughout the country were almost unanimous in labelling field interrogation as a principle problem in police-community relations. "The evidence is weighty and uncontradicted that stop and frisk power is employed by police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged." Kuh, *In-Field Interrogation: Stop, Question, Detention and Frisk*, 3 CRIM. L. BULL. 597, 605 (1967) (quoting an amici brief to the United States Supreme Court by the National Association for the Advancement of Colored People).

88. *Id.*

89. *Id.*

90. Traditional civil suits against police officers are largely ineffective for two reasons. One is the difficulty of satisfying a judgment in a substantial amount against

prohibited simply because it is subject to potential abuse. The fact that stop laws may incidentally foster minority harassment is no reason to prohibit an otherwise necessary and effective law enforcement tool.

A final argument is that stop and frisk laws violate the fifth amendment due process clause,[91] because of vagueness. The assertion is that the lack of definite guidelines provides no ascertainable standards for determining the boundaries of proper or improper conduct.[92] There is an obvious example of this in *Summers*. The Court uses the word "occupant" but does not state whether it means residents only, or residents and visitors.[93] One would have good grounds to argue that such vagueness renders stop and frisk laws violative of due process, and therefore should be eliminated. However, the alternative is to return to traditional arrest law with its probable cause standard. While the probable cause standard may be more familiar to the courts, it can hardly be considered more definite since both tests use objective standards.[94] Moreover, the use of objective standards does not make a statute unconstitutionally vague. Courts have historically been guided by objective standards.[95] While stop and frisk statutes do not list the specific questions to be asked or state a specific time

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a relatively impecunious policeman; the other is that the individual subjected to police misconduct either has not suffered any actual damage or else the damages suffered are so speculative as to be extremely difficult to prove.

As regards remedial action by discipliniary measures directed at the offending officer, this seems quite unrealistic if the officer actually obtains incriminating evidence, even though his conduct was illegal. Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L. C. & P.S. 465, 491 (1967).

91. That amendment reads in pertinent part, "Nor shall any person . . . by deprived of . . . liberty . . . without due process of law." U.S. CONST. amend. V.

92. The assertion is that the standards are vague because of the indefinite length of time for a stop, the failure to mention the amount of allowable force, and the vague definitions of "temporary questioning" and "reasonable suspicion".

93. *See infra* note 150 and accompanying text.

94. Both tests deal with probabilities. An arrest is reasonable grounds to believe a crime was committed, while a stop is based on reasonable grounds to suspect that a crime was committed. Therefore, it is arguable that the difference may not be one of kind, but rather in the degree of probability required.

95. "To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." People v. Smith, 36 Cal. App. 2d Supp. 748 (1939), 92 P.2d 1039, 1042.

A statute providing that aliens may be deported for failure to furnish notification of address unless such failure is *reasonably excusable* provides sufficiently definite standards and is no so vague as to be unconstitutional. Czapkowski v. Holland, 220 F.2d 436 (3d Cir. 1955) (per curium), *cert. denied*, 350 U.S. 826 (1955).

limitation for a stop, the terms of the statutes are sufficiently defined to satisfy the due process clause.[96]

The previous arguments have advocated the elimination of stop and frisk proceedings entirely. Were such arguments accepted by the courts, Summers could not have been detained unless the police had come with an arrest warrant. Yet at the opposite extreme is the argument that more crimes would be solved if all persons were subject to unrestricted police authority to stop and frisk.[97] While this may be true, such power is obviously incompatible with a free and open society. It should be sufficient to say that in a free society, the arguments for unrestricted police authority could never override the concepts of privacy, liberty, autonomy, and human dignity.

The right to stop and question suspects is an essential law enforcement tool. Without the procedure, the police are limited to arresting for probable cause or not stopping the suspect at all.[98] But, the fourth amendment does not require the police to either arrest the suspect or let the suspect go free. On the contrary, it may be "the essence of good police work"[99] to utilize an intermediate step—the investigatory stop.

In justifying this intermediate position, the Court has properly considered fundamental fourth amendment concerns. The fourth amendment requires a showing of probable cause—a proper balance of the opposing interests of crime prevention and personal privacy. Because of the insignificant intrusion upon personal privacy, the Supreme Court decided the investigatory stop is consistent with the

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96. Comment, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L., C. & P.S. 539-40 (1967).

97. This general, simple truism may be valid on it face. But, the implications on personal liberty, privacy, and dignity are so horrendous that such authority could never be legitimated for the purpose of effecutating more criminal convictions.

98. Because of the importance of crime prevention in our crime-infested society, the inability to detain based on reasonable suspicion would eventually expand the probable cause concept to include these borderline cases. This would "widen the power of the police to visit upon persons the consequences of arrest when such should not be done. Thus the constitutional standard of probable cause prior to an arrest . . . will be diluted to the point that situations warranting only [an investigatory] stop will be considered an arrest." United States v. Thomas, 250 F.Supp. 771, 796 (1966). *See also* LaFave, *Detention for Investigation*, WASH. U.L.Q. 367-73 (1962).

99. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response." Adams v. Williams, 407 U.S. 143, 145 (1972) (citing *Terry*, 392 U.S. at 23).

fourth amendment's balance of order and freedom. An investigatory stop, as limited as it may be, is the only recognized exception to the probable cause requirement that can justify a detention on less than probable cause.[100] The fourth amendment requires that any other actions which interfere with personal privacy and liberty must satisfy the fourth amendment's requirement of probable cause.

### FOURTH AMENDMENT PREREQUISITES FOR SEARCH WARRANTS

Police searches are an obvious interference with personal privacy and liberty. Thus the fourth amendment commands that search warrants only be issued upon probable cause and with a particular description of the place to be searched and the things to be seized.[101] Since search warrants only authorize the search of places and the seizure of things, they may be issued to search any property, whether or not such property is occupied.[102] Moreover, search warrants need not name the person from whom the things will be seized.[103] The *Summers* decision hinges on the search warrant and the stop. The Court held that a search warrant carries with it the authority to detain the occupants of the premises during the search.[104] Yet, the objective of "searching" is to search for and seize the specific property named in the warrant, without invading other privacy rights of those persons involved. This is why *Summers* is such a constitutional shock. Under this traditional rationale, people had constitutional privacy rights despite the search.

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100. Other probable cause exceptions include consent searches, administrative searches and searches incident to arrest; but these exceptions generally do not entail detentions. If, however, a detention occurs, it is justified by the detainee's consent or by the concurrent arrest, not by the probable cause exception, per se.

101. *See supra* note 8 and accompanying text.

102. Zurcher v. Stanford Daily, 436 U.S. 547, 554 (1978). In *Zurcher*, nine policemen were injured by demonstrators at Stanford University Hospital. Two days later the *Stanford Daily* carried articles and photos devoted to the demonstration and attack. The photos by a staff member indicated that the had been located where he could have photographed the assailants. A warrant was obtained to search the *Daily's* offices for negatives, film and pictures relevant to identification of the assailants. The Court upheld the warrant.

103. In most cases, search warrants are directed at the premises, to find "evidence" of crime. *See* United States v. Kahn, 415 U.S. 143, 155 n.15 (1974). However, it is possible that if criminal activity is continuing from one location, a search warrant for the premises may also include a search of a specific person on the premises, as long as there is probable cause to believe that he might have evidence on his person. *See* Ybarra v. Illinois, 444 U.S. 85 (1979) (a search warrant for narcotics authorized the search of the "Aurora Tap Tavern" and the bartender, "Greg").

104. "[W]e hold that a warrant to search for contraband . . . carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Michigan v. Summers, 452 U.S. 692, 705 (1981).

*Summers* apparently removes such rights of liberty, privacy and freedom of movement. Since, however, the execution of a search warrant invades the privacy of persons legally presumed innocent, the Constitution unequivacably requires the showing of probable cause before the issuance of any warrant.

Warrants are only issued upon probable cause that the specific things sought to be seized are located on the property. Although conceptually simple, the practical execution of warrants is replete with pitfalls for the unwary police officer. The progression from initial application for the warrant to completion of the search is filled with numerous but important details.[105] The aspects of the search warrant that are pertinent here relate to the need for a particular description of the things to be seized, the the propriety of detaining and searching persons found on the premises. These aspects are critical in analyzing the propriety of the *Summers* decision.

The fourth amendment requirement of a particular description of the things to be seized is intended to prevent general searches[106] and thus protect personal privacy in the home. Particularity of description is required so that the executing officer can reasonably ascertain and identify[107] the places authorized to be searched and the things authorized to be seized. Yet, a particular description in a search warrant does not entail a rigid, technical accuracy and completeness. The courts only require the description to be sufficiently definite[108] to enable the searcher to identify the persons, places, and things authorized to be searched and seized. Even such minimal particularity of description precludes the use of general warrants and arbitrary police power since little is left to the discretion of the searching officer. The absence of a "particular description" requirement for search warrants,

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105. The aspects of a search warrant that are important, but will not be covered by this article, are: the need for a neutral and detached magistrate, Connally v. Georgia, 429 U.S. 245 (1977); a particular description of the place to be searched, Steele v. United States, 267 U.S. 498 (1925); the time of execution, United States v. Nepstead, 424 F.2d 269 (9th Cir. 1970); right to gain entry to the premises, Kerr v. California, 374 U.S. 23 (1963); and, the general conduct of the officers before, during and after the search.

106. *See supra* note 22 and accompanying text.

107. "It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." Steele v. United States, 267 U.S. 498, 503 (1925).

108. "[A]ffidavits for search warrants . . . must be tested and interpreted . . . in a commonsense and realistic fashion. . . .Technical requirements of elaborate specificity . . . have no proper place in this area." United States v. Ventresca, 380 U.S. 102, 108 (1965).

or even investigatory stops,[109] would sanction too much police discretion and justify "fishing expeditions."

Although the warrant adequately describes the premises and the property to be searched and seized, the police must demonstrate a separate probable cause to search any person not mentioned in the warrant, who is found on the premises.[110] It is unconstitutional to search persons not connected with the place being searched,[111] who merely happen to be upon the premises[112] and who are not named or described in the search warrant.[113] Mere presence at the place where the search warrant is to be executed is not probable cause to search that person.[114] Rather, the law requires probable cause to believe that

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109. *See supra* note 52.

110. *See generally*, Ybarra v. Illinois, 444 U.S. 85 (1979). A search warrant for contraband was executed for the premises of a tavern and for the bartender. A cursory search for weapons of all the twelve patrons present was held invalid because the warrant did not specify probable cause in regards to the customers; and, mere propinquity to others independently suspected of criminal activity did not give rise to probable cause to search that person. *See also* Wall, *Fourth Amendment - Search of Individuals Pursuant to a Warrant to Search the Premises*, 71 J. CRIM. L. & C. 558 (1980).

111. A search of a person on the premises described in the search warrant is not authorized "without some showing of a connection with those premises." People v. Dukes, 48 Ill. App. 3d 237, ____, 363 N.E.2d 62, 64 (1977).

112. One case precluding mere presence as basis for a search is United States v. Miller, 546 F.2d 251 (8th Cir. 1976). In *Miller*, police officers with a search warrant for narcotics, entered the premises and found two women and the defendant in the kitchen. Defendant requested permission to leave since he did not live there, but he was detained until narcotics were discovered. The court held that the officers could detain the defendant, briefly, for the purpose of questioning him with respect to identification and his reason for being on the premises. If there was no knowledge that he was there for any unlawful purpose, he was free to leave. The court added, following *Terry*, that the defendant could only be searched if the officers believed that he was armed and dangerous. *See also*, State v. Bradbury, 243 A.2d 302 (N.H. 1968). In *Bradbury*, a search warrant was issued for a women's dormitory room. Defendant, a male, was found on the premises when the warrant was executed. The decision was similar to *Miller*. The officers were not authorized to search him and the length of any detention was governed by *Terry*.

113. *See supra* note 110.

114. The Supreme Court, in *United States v. DiRe*, 332 U.S. 581 (1948), held that a person, by mere presence in a suspected car, does not lose the immunity from the search of his person to which he would otherwise be entitled. At the time of detention, the police had no information implicating the defendant and no information pointing to any possession of contraband. Therefore, the police could not infer participation from mere presence. *Id.* at 587, 592-94. "The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." Sibron v. New York, 392 U.S. 40, 62 (1968).

the suspect may be concealing on his person at least some of the items sought.[115] This holding is certainly proper. Any broader power to search persons present at the place to be searched would ignore vital fourth amendment concerns by tacitly sanctioning the resurgence of general warrants and arbitrary police power.

When there is no probable cause to search particular individuals found at the site of the search warrant the police may still detain those who might be concealing critical evidence.[116] As indicated above,[117] *Terry* permits the stopping of such persons for investigation based on reasonable suspicion. The usage of *Terry* and its progeny is no longer limited to the strict on-the-street type detention.[118] Rather, the focus is on the requirement of a reasonable suspicion that the suspect is involved in some form of illegal activity. In the case of a search warrant a reasonable suspicion will justify only a brief stop of the individual for questioning necessary to resolve the officer's uncertainty regarding the possible connection of that individual with the items named in the warrant. However, *Terry* does not permit a search for contraband on less than probable cause.[119] Individuals found at the site of the search warrant, who are not named in the warrant, still maintain the privacy interests guaranteed by the fourth amendment. Without probable cause, such an individual does not lose those privacy rights by mere presence at the site of an executed search warrant.[120]

Probable cause to search the premises and the occupants will justify an invasion of privacy rights for a detention of the occupants and a search of the house.[121] Reasonable suspicion, on the other hand, will only justify an invasion of privacy rights for a brief detention

115. The law requires that there be probable cause to believe that such persons are themselves participating in criminal activity or, somewhat more precisely, that there be probable cause that evidence which might be concealed or destroyed is to be found upon the person searched. 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 144 (1978).

116. Are police powerless to take any steps at all to foreclose the risk of persons departing with critical evidence concealed? *United States v. Festa*, 192 F. Supp. 160 (D. Mass. 1960), and *Commonwealth v. Snow*, 298 N.E.2d 804 (Mass. 1973), imply that they are powerless and suggest prolonged detention as a precautionary measure.

117. *See supra* notes 6, 47 and accompanying text.

118. *See infra* note 134 and accompanying text.

119. *Terry* announced that police must have probable cause to search persons not named in a warrant in all cases, except those where weapons are suspected. Terry v. Ohio, 392 U.S. at 26, 27.

120. *See supra* notes 110 and 114 and accompanying text.

121. *See supra* notes 102, 110 and accompanying text.

and a search for weapons, if appropriate.[122] Therefore, when police officers enter a premises with a search warrant for contraband but without probable cause to search persons found there, as in *Summers*, consistency with investigatory stop rationale and search warrant law requires that such persons may only be detained upon reasonable suspicion. If reasonable suspicion exists, the detention may last only long enough to allay the officer's suspicion, just as on-the-street encounters. If reasonable suspicion does not exist, the suspects cannot be detained simply for being in the house and should be free to leave.

## THE IMPACT OF MICHIGAN V. SUMMERS ON ESTABLISHED STOP AND WARRANT DOCTRINES

Because of the constitutional guarantees of liberty, privacy, and freedom of movement,[123] persons who are not described in a search warrant and who are not reasonably suspicious in regard to the illegal activity should be free to leave the search warrant site. Contrary to this rationale, which is the only logical conclusion under established stop and warrant law, the Supreme Court in *Michigan v. Summers*[124] held that a search warrant for contraband carries with it the authority to detain the occupants of the premises for the length of the search. This decision is ostensibly founded on both investigatory stop rationale and search warrant law. *Summers*' initial stop is derived from investigatory stop rationale, that is, an individual in a house being searched supports enough reasonable suspicion to justify the stop. The search warrant then establishes the time element by limiting the detention to the length of the search. However, *Summers* has far-reaching ramifications for established principles in both areas. The decision is inconsistent with both the traditional detention element of an investigatory stop and the detention and probable cause elements under a search warrant. Consequently, *Summers* will radically affect the established fourth amendment balance of order and freedom.

In *Summers*, police officers obtained a search warrant and were preparing to search a house for narcotics when they encountered Summers descending the front steps. They requested his assistance in gaining entry into the house and then detained him while they searched the premises. After finding narcotics in the basement, the police arrested Summers. A subsequent search of his person disclosed heroin. Summers was charged with possession of the heroin found on his per-

122. *See supra* note 2 and accompanying text.
123. *See supra* note 51.
124. 452 U.S. 692 (1981).

son. He moved to suppress the evidence as a product of an illegal search in violation of the fourth amendment. The trial judge's granting of the motion was affirmed by the Michigan Court of Appeals[125] and the Michigan Supreme Court.[126]

The United States Supreme Court's subsequent reversal was based on a line of cases beginning with *Terry v. Ohio*.[127] These cases recognized an exception to the fourth amendment's probable cause requirement based on the government's interest in crime prevention and the minimal intrusion on the citizen's privacy.[128] While all of these cases are distinctive, they all use the investigatory stop as a starting point.

*Terry* was the first case to enunciate the major elements of a valid investigatory stop.[129] These elements are still the requisite underpinnings of current investigatory stop procedures. Yet, the Supreme Court has subsequently seen fit to expand the scope of the initial investigatory stop requirements.

The first major investigatory stop case after *Terry* was *Adams v. Williams*.[130] Acting on an informant's tip, a police officer approached a parked car, reached inside and removed a fully-loaded revolver from the driver's waistband. The driver was convicted of illegal possession of the handgun as well as possession of the heroin that was found during a full search incident to his weapons arrest.[131] This decision expanded the scope of *Terry* in two respects. First, it approved a stop based on an unverified tip, in contravention of *Terry*'s requirement that the articulable suspicious facts be based on an officer's personal observation.[132] Second, the suspected criminal activity prompting the stop was a mere possessory offense, as contrasted with the suspected armed robbery activity in *Terry*.

The next obvious extension of the investigatory stop emerged in *United States v. Brignoni-Ponce*.[133] In *Brignoni*, the Court expressly extended *Terry*'s stop doctrine to include the stopping of automobiles.

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125. 68 Mich. App. 571, 243 N.W.2d 689 (1976).
126. 407 Mich. 432, 286 N.W.2d 226 (1979).
127. *See supra* note 2 and accompanying text.
128. Michigan v. Summers, 452 U.S. 692, 697-98 (1981).
129. *See supra* text accompanying note 47.
130. 407 U.S. 143 (1972).
131. *Id.* at 144.
132. *Terry* required "reasonable suspicion" before a "stop". It had been infered that if the officer is not on the scene, he will not be in a position to develop the reasonable suspicion.
133. 422 U.S. 873 (1975).

Although this added an entirely new field to the investigatory stop, the Court maintained traditional *Terry* doctrine by still requiring the necessary articulable facts from which to infer a reasonable suspicion of illegality.[134]

Most recently, the Supreme Court has expanded the reasonable suspicion element of a stop by giving great deference to the "trained eye."[135] In *United States v. Mendenhall*,[136] the Court allowed a stop primarily on the basis of a drug courier profile.[137] The Court recognized the Drug Enforcement Administration agent's special training and gave deference to his expertise in ferreting out illegal drug traffic. Thus, the Supreme Court validated the stop as reasonable under the circumstances without strictly scrutinizing the constitutional questions presented by the Administration's procedures.

These cases illustrate that the exception for limited intrusions that may be justified by law enforcement interests has not been confined to the momentary on-the-street detention involved in *Terry*. The question, though, is whether these cases justify the intrusion in *Summers*. Although a few minor comparisons can be drawn,[138] there is not a progression of Supreme Court decision that lead to the point where it is obvious that *Summers* must be the next step in the progression.

The Supreme Court apparently was not concerned with this absence of a logical progression because the Court did not decide *Summers* on that basis. Instead, the Court relied on the underlying principle of minimal intrusion.[139] The Court stated that *Terry* and its pro-

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134. "[O]fficers on roving patrols may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.* at 884.

135. When someone has been trained to watch for, detect, or notice something in particular, or has experience in so doing, such that he can perform the task much better than the average citizen, the person is considered to have a "trained eye."

136. 446 U.S. 544 (1980).

137. A "drug courier profile" is an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs.

138. In both *Summers* and *Adams*, the suspected criminal activity prompting the stop was a mere possessory offense. It can be inferred that in *Mendenhall* and *Summers* the Court gave deference to the "trained eye"—the officer's ability to ferret out illegal drug traffickers. Furthermore, one could argue that the *Brignoni* car stop is a logical step between a purely public, on-the-street, *Terry*-type stop and a purely private, in-the-home, *Summers*-type detention.

139. "These cases recognize that some seizures . . . constitute such limited intrusions on the personal security of those detained . . . that they may be made on less than probable cause. . . ." Michigan v. Summers, 452 U.S. at 699.

"Therefore, in order to decide . . . this case . . . it is necessary to examine . . . the character of the official intrusion. . . ." *Id.* at 700-01.

gency permit an exception to the probable cause requirement if the resulting intrusion on the citizen's privacy is minimal. The Court analyzed the facts in *Summers* and found the detention of the occupants to be a limited intrusion because it was "surely less intrusive than the search itself."[140] The Court concluded that the detention in Summers fit the exception and therefore could be based on less than probable cause. Thus the Supreme Court relied on the investigatory stop rationale regarding the minimalness of the intrusion, and not on a logical progression of case law, when it held that a warrant to search for contraband carries with it the limited authority to detain occupants of the premises while the search is conducted.

*An Examination of Summers' Right to Detain in Light of Prior Stop and Warrant Laws*

The Supreme Court decision in *Summers* appears irreconcilable with the rationale behind search warrants and investigatory stops. The Court in *Summers* extended these concepts beyond previously recognized limits but did not acknowledge the extensions. Instead, the Court stated that the decision lies entirely within the bounds of existing precedent.[141] However, a close analysis reveals major discrepancies. *Terry* permitted only brief detentions to allay the officer's suspicion.[142] *Summers* permits detentions for the duration of the search.[143] *Terry* authorized detentions based on reasonable suspicion[144] while *Summers* implies that the right to detain can be based solely on presence or mere proximity.[145] Under traditional warrant law the scope of a search and seizure is justified only by the

140. Michigan v. Summers, 452 U.S. at 701. *But see* Chimel v. California, 395 U.S. 752, 767 n.12 (1969). "[W]e see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."

141. The Court reasoned that "[i]n these cases the intrusion on the citizen's privacy 'was so much less severe' than that involved in a traditional arrest that 'the opposing interests in crime prevention and detection and in the police officer's safety' could support the seizure as reasonable." Michigan v. Summers, 452 U.S. at 697-98 (quoting Dunaway v. New York, 442 U.S. 200, 209 (1979)).

142. *See supra* note 66 and accompanying text.

143. "[W]e hold that a warrant to seach for contraband . . . carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Michigan v. Summers, 452 U.S. at 705.

144. *See supra* note 2 and accompanying text.

145. "[A] warrant to search . . . carries with it the limited authority to detain the occupants of the premises." Michigan v. Summers, 452 U.S. at 705.

scope of the underlying warrant;[146] yet, *Summers* justifies the detention of persons not even mentioned in the underlying warrant. If these discrepancies are not reconciled or the decision in *Summers* more precisely defined, a consistent and predictable application of this new standard will be impossible.

One of the major conflicts between *Terry* and *Summers* is the duration of the detention. By balancing the crime prevention interest and the individual privacy interest, the Supreme Court in *Terry* decided that stops must be relatively informal, brief, and of limited intrusion upon the person's privacy. *Summers*, on the other hand, allows the occupants to be held for the length of the search. Since searches have lasted anywhere from fifteen minutes[147] to three days,[148] a detention during the search of a house has the potential to be formal, long, and a significant intrusion upon a person's privacy. The potential duration of the search thus threatens the occupant with a lengthy detention unwarranted in a *Terry*-type stop.

Assuming such impositions can be overlooked,[149] the *Summers* decision is still plagued with unnecessarily vague language. In *Terry*, the Court authorized detentions based on reasonable suspicion. But in *Summers* the Court held that a search warrant implicitly carries with it the authority "to detain the occupants of the premises."[150] The word "occupant" is critical to the decision, yet the Court makes no attempt to define it. In the context of the decision the word occupant could have two meanings. If occupant is strictly construed to mean only a tenant or the owner then mere visitors should be allowed to

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146. For instance, in *Chimel v. California*, 395 U.S. 752 (1969), the Supreme Court held that routine searches of rooms other than that in which the arrest occurred are invalid unless conducted pursuant to a valid search warrant. "Such searches, in absence of well-recognized exceptions, may be made only under the authority of the search warrant." *Id.* at 763. Again, in *Jones v. United States*, 357 U.S. 493 (1958), the Court held that a daytime search warrant is ineffective to support a nighttime search of the premises.

147. United States v. Miller, 546 F.2d 251 (8th Cir. 1976) (a search for narcotics was finished in fifteen minutes when narcotics were found in the refrigerator).

148. State v. Swain, 269 N.W.2d 707 (Minn. 1978) (a three day search of a house in an effort to find blood stains).

149. From a practical standpoint the impositions may be hard to overlook. If a warrant is executed as the occupant leaves for work, he will be forced to miss work. If the warrant is executed at night or on a weekend the occupant will be forced to forgo meetings and social outings. This is not to suggest that warrants should not be permitted at these times, just that the accompanying detentions should not be permitted.

150. *See supra* note 143.

leave. But, if visitors may leave, they could take the sought for contraband with them. Thus, the argument that occupant detention is necessary for police safety and to prevent contraband from leaving the premises[151] is inconsistent with allowing visitors to leave. The other alternative is to interpret occupant as meaning anyone present. This definition however will pose different problems since mere presence on the scene will not support a prolonged detention of the occupant.[152] With no subsequent case law, it is mere conjecture as to which definition of occupant the Court will ultimately choose.

Regardless of the chosen definition, it is obvious that occupant is not limited to someone "in" the house. Summers was not in the house, but rather on the front porch, when the officers arrived. Yet, he was detained as an occupant during the search. However, it is not so obvious whether the occupant must be "on" the premises. The Court stated that officer may detain "occupants of the premises."[153] One wonders whether this means "on" the premises, or whether this phrase leaves open the inference of reasonable proximity. Theoretically, the *Summers* decision should only apply to occupants literally on the premises since the basis for the detention is the warrant, and search warrants must particularly describe the place of the search. But, consider the potential in the following settings: the owner is on the street in front of his house; the owner is next door talking to neighbors; there are two tenants, one is leaving the premises to join the second tenant a block away; and finally, the tenant is at work five miles away. Most people would agree that the tenant five miles away cannot be detained. But the other cases raise serious problems. Without definite guidelines these detentions inevitably are subject to the discretion of the officer in charge. But *Terry* does not allow such arbitrary police power in the execution of investigatory stops.[154] Moreover, *Terry* does

151. *See infra* note 160 and accompanying text.

152. Presence is not enough to conclude that a person is engaged in criminal activity, without knowledge specifically linking the detained person to the crime. United States v. DiRe, 332 U.S. 581, 593 (1948).

If there is a sufficient degree of suspicion to justify a brief seizure of the individual for investigation, that investigation may resolve the uncertainty in the mind of the officer concerning the possible connection of that individual with the property named in the warrant. But, a prolonged and subsequent detention is not valid. United States v. Jennings, 468 F.2d 111, 115 (9th Cir. 1972). "No cases have been cited, nor found by us, which in a stop and frisk situation authorized the holding of a person for a prolonged period." United States v. Miller, 546 F.2d 251, 253 (8th Cir. 1976).

153. *See supra* note 143.

154. One might suggest that *Mendenhall*'s "trained eye" theory would allow police discretion in detaining persons reasonably close to the premises. *See supra* notes 135-36 and accompanying text. Yet, the problem here is not whether one can pick

not authorize such a potential for prolonged detentions. Therefore, *Summers* is not consistent with the principles set forth in *Terry*.

But following the *Summers*' rationale, *Summers* and *Terry* should be consistent. The Court allowed the detention in *Summers* because of the *Terry* decision that probable cause was not required where the resulting intrusion on individual privacy was minimal. Since both cases deal with detentions, the resulting intrusion should be similar. Therefore, *Summers* should adopt *Terry*'s balance of order and freedom to insure that the detention is in fact only a minimal intrusion. However, as just previously mentioned, *Summers* has not adopted *Terry*'s balance. Reasonable suspicion is not required, nor is the detention required to be brief or momentary. Therefore, it is questionable whether *Summers*'s intrusion is in fact minimal.

While *Summers* is clearly not consistent with *Terry* with respect to the principles of a stop, inquiry is necessary into whether *Summers* can be reconciled with prevailing search warrant law.[155] If *Summers* authorized the search of individuals under the auspices of a search warrant, it would obviously set new precedent.[156] But *Summers* does not explicitly authorize a search of the occupants, it only authorizes a detention—a *Terry* concept. However, the authorized detention is beyond the narrow scope of *Terry*. The Supreme Court has held that the detention of a citizen beyond the narrow scope of *Terry* is reasonable only if supported by probable cause for arrest[157] or "justified by particularized police interests" other than a desire to initiate criminal proceedings against the detained person.[158]

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out the occupant or match him to a profile. The problem is whether there are grounds for detaining him when he is not actually on the search warrant site. The "trained eye" theory does not answer that question. *See also supra* note 6.

155. When the Court said, "a warrant to search . . . carries with it the limited authority to detain," *see supra* note 143, one could reasonably infer that either *Terry* or search warrant law was justification for the detention. Thus, *Summers* should be reconcilable with one, if not both, justifications.

156. Police must have probable cause to search persons unnamed in a warrant in all cases except where weapons are suspected. Ybarra v. Illinois, 444 U.S. 85 (1979).

"The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference to support an intrusion by the police upon an individual's personal security." Sibron v. New York, 392 U.S. 40, 62 (1968).

When there is no probable cause to believe the occupant was involved in the crime, there is no right to search that person.

158. The *Terry* stop was a narrow exception. The officer may question the suspect and ask him to explain the circumstances, but any further detention must be based on consent or probable cause. United States v. Chamberlain, 609 F.2d 1318, 1322-23 (9th Cir. 1979), [*citing* Dunaway v. New York, 442 U.S. 200 (1979)].

The Court in *Summers* conceded the pre-arrest seizure was not supported by probable cause.[159] However, it justified its decision upon other legitimate law enforcement interests. Those interests include having the person present if evidence turns up, facilitating a more orderly search, preventing frustration of the search, and increasing officer safety.[160] Therefore, to support a prolonged detention, the interests advanced by *Summers* must exhibit more than the desire to initiate criminal proceedings against the detained person.

The Supreme Court in *Summers* listed these four justifications for the detention of occupants. The first is the "legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found."[161] The second is "the orderly completion of the search may be facilitated if the occupants of the premises are present."[162] But these objectives represent nothing more than the ordinary police interest in discovering evidence and apprehending wrongdoers. They are not "particularized police interests" as required by the Court[163] since they are merely designed to aid in the initiation of criminal proceedings against the person detained. And without probable cause, as in *Summers*, the Court requires that detentions can only be justified by particularized police interests other than the desire to initiate criminal proceedings against the suspect. Therefore, these two "legitimate interests" cannot support a valid detention.

The third justification for allowing the detention is the interest in preventing the suspect from frustrating the search. This argument is without merit since it is doubtful that persons would attempt to remove evidence that was not already on their person. With the police searching the house, these individuals are not likely to risk revealing the hiding place of the contraband in an attempt to remove it. Similarly, it is unlikely that an individual would leave the premises

158. Cupp v. Murphy, 412 U.S. 291, 299 (1973). Street encounters can be initiated for a variety of purposes unrelated to a desire to prosecute crime: weapons confiscation, control of gangs and juveniles, disturbance control, or traffic control. LaFave, *"Street Encounters"*, *supra* note 57, at 61-62.

159. 452 U.S. at 696 (1981).

160. "Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers." *Id.* at 702. "Finally, the orderly completion of the search may be facilitated if the occupants of the premises are present." *Id.* at 703.

161. *See supra* note 160.

162. *See supra* note 160.

163. *See supra* note 158 and accompanying text.

to go for "help" and then return to frustrate the search.[164] Therefore, the police interest in preventing the occupants from frustrating the search might be more readily achieved if the occupants were free to leave the premises.

The fourth justification for allowing the detention is the interest in police safety. This is of course a vital interest. Yet, it does not justify a detention for the duration of the search. *Terry* permits a frisk for weapons only if the officer fears for his safety.[165] If the officer detains the occupant but has no reason to frisk him, the officer is creating more danger by detaining this possibly armed person inside the premises. If there is reasonable suspicion that the occupants have weapons the officer may frisk the occupants for such weapons. In these circumstances, it is the frisk and not the detention that promotes the police safety interest. Moreover, if the suspect shows a willingness to leave, the police have no basis for fear. Such a willingness negates the intention to harm the police or interfere with the search. Thus, police safety is not a valid justification for allowing a prolonged detention.

Although the four interests advanced in *Summers* do not justify a prolonged detention, the police are not powerless to let the "occupant" walk out the door with incriminating evidence. They can still employ the investigatory stop. However, the stop does not justify a search for contraband on the person.[166] The search pursuant to a stop must be confined in scope to discovering weapons and does not justify a personal search to prevent the disappearance of evidence.[167] A detention and frisk beyond the narrow scope of *Terry* is reasonable only if it is suppported by probable cause to arrest or by particularized police interests.[168]

Although the detention was not supported by probable cause to arrest,[169] the Court attempted to justify the *Summers*' decision on two different grounds. First, the supposed minimalness of the intrusion allowed a detention based on less than probable cause. Yet, *Terry* set forth the guidelines for such an exception and stated that a less

164. If there is no contraband on the premises, there is no need to return to frustrate the search. If there is contraband on the premises, the "occupant" will probably not want to return once he is free to leave.

165. *See supra* note 2.

166. "[A] search . . . is not justified by any need to prevent the disappearance or destruction of evidence of crime." Terry v. Ohio, 392 U.S. at 29.

167. *See supra* note 166.

168. *See supra* notes 157 and 158 and accompanying text.

169. *See supra* note 159 and accompanying text.

stringent standard would result in intrusions upon constitutionally guaranteed rights.[170] *Summers* however did not follow *Terry*'s guidelines,[171] but used a less stringent standard than the one set forth in *Terry*. This raises legitimate questions as to the constitutionality of the *Summers*' "intrusions." Second, the Court offered several police interests in support of the detention. Yet, these interests do not support a detention of the occupants.[172] Therefore, the decision that a search warrant carries with it the authority to detain suspects is based on an absence of logic and clear reasoning.

*The Constitutionality of the Summers' Detention*

The decision in *Summers* is not justified by investigatory stop rationale, search warrant law, or any other line of prior case law. The Supreme Court clearly established new law. The Court should have explicitly recognized the *Summers*' detention as new law, without attempting to bootstrap it to previously accepted principles. Nevertheless, even in absence of such precedence, the essential question is whether this new law is in fact constitutional.[173]

One problem with the *Summers*' decision is its use of extremely broad and vague terms.[174] Undoubtedly these terms will be narrowed on a case-by-case basis, but presently these broad terms are of major concern. For instance, the Court justified the detention of occupants in order to prevent flight "in the event that incriminating evidence is found."[175] One trusts that the Court was not inferring that a suspect can be held until probable cause to arrest is discovered. If the police can detain a person while searching for probable cause to arrest him the fourth amendment requirement of probable cause has been materially weakened. The same holds true for search and seizure law. The scope of a search and seizure is justified only by the scope of the underlying warrant.[176] If police may seize and detain a person to facilitate the execution of a warrant that did not authorize his arrest, the scope of the underlying warrant has been totally ignored. It must be remembered that detentions, whether they be pre-arrest detentions or detentions during a search, are not validated by what is discovered later for this is clearly bootstrapping. The detention must

170. *See supra* note 51 and accompanying text.
171. *See supra* text accompanying notes 154-55.
172. *See supra* notes 161 through 165 and accompanying text.
173. *See supra* note 51.
174. *See supra* notes 150 and 152 and accompanying text.
175. *See supra* note 160.
176. *See supra* note 146 and accompanying text.

be valid at the inception of the search.[177] If this basic premise is subverted, the protections afforded by the fourth amendment will be severely curtailed.

Once the scope of the underlying warrant is ignored or the fourth amendment suspicion requirement disregarded, people will be seized and detained for mere presence or proximity to the premises. The police will no longer have to present a rational nexus between the person and the suspected contraband—presence on the premises will be a sufficient nexus. Citizens will be subject to extensive detentions in the hope that incriminating evidence will be found, thereby permitting the citizens' arrest. In effect, because of their presence, persons found on the premises will be viewed as potential "containers"[178] of contraband, and not as personages. Presence will become the ultimate criterion for a search.

However, treating persons like "containers" is a flagrant deprivation of the fourth amendment protections of personal privacy and liberty. Until *Summers*, personal privacy and liberty were protected by limiting intrusions to the detection of weapons and not the detection of contraband and other evidence. If individuals are viewed as containers, such personal rights will necessarily be considered irrelevant in respect to prohibiting such personal searches. Thus, *Summers*' authorization to seize and detain a person to facilitate the execution of a warrant will lead to the right to search that person not only

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177. In United States v. DiRe, 332 U.S. 581 (1948), the Court pointed out that:

> The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.

*Id.* at 595 (footnote omitted).

178. The Court has generally respected the privacy rights inherent in a container. However, the trend is changing. In 1981, the Court decided that containers in the passenger compartment of an automobile could be searched, *New York v. Belton*, 453 U.S. 950 (1981), but that containers in the trunk could not be, *Robbins v. California*, 453 U.S. 420 (1981). In 1982, the Court in effect overruled *Robbins* and held that any container found in any part of the automobile could be searched, *United States v. Ross*, 456 U.S. ____, 50 U.S.L.W. 4580 (1982). The sanctity of containers has been destroyed. The scope of the search is no longer defined by the nature of the container but by the object of the search. The individual's expectation of privacy will not survive a lawful custodial arrest or a finding of probable cause. One might suspect that these latest decisions by the Court, including *Ross* and *Summers*, reflect the conservative nature of the Court and its willingness to crack down on crime—albeit in a questionable manner.

for weapons but also for items named in the warrant. This goes far beyond recognized fourth amendment doctrine.

A second major problem is that *Summers*' authorization of a detention based only on probable cause to search the house obscures the innate differences between an arrest warrant and a search warrant. Probable cause to issue and execute a search warrant is not probable cause to arrest.[179] Search warrants relate only to property and "named" persons while arrest warrants relate only to persons.[180] The critical element in a reasonable search is not that the owner of the property is suspected of a crime but rather that there is reasonable cause to believe that the specific things to be searched for are located on the property.[181] Although it appears that the granting of a search warrant must be supported by the same degree of probable cause as the granting of an arrest warrant, it is clear that the warrants themselves are not identical. *Summers* has taken a significant step towards eliminating that unmistakable difference by recognizing the appropriateness of a detention and subsequent arrest under a search warrant.

The fourth amendment must be the principle guidepost in considering the propriety and constitutionality of this new development. The fourth amendment was intended to protect the privacy rights of the individual by requiring probable cause to search or seize any person. The merger of arrest warrants and search warrants as initiated by *Summers* entails a fiction of probable cause. In *Summers*, though there was probable cause to search, there was no probable cause to "seize" the occupants. Such a merger sacrifices individual personal rights. Yet, these rights are too fundamental to a free society to be sacrificed as a result of judicial fiction or for the sake of mere police convenience and efficiency. When a search warrant is in-

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179. Probable cause to search is when

> the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. By comparison, the right of arrest arises only when a crime is committed or attempted in the presence of the arresting officer or when the officer has . . . [probable cause] to believe that a felony has been committed by the person to be arrested. Although it would appear that the conclusions which justify either arrest or the issuance of a search warrant must be supported by evidence of the same degree of probity, it is clear that the conclusions themselves are not identical.

LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"*, 1966 U. ILL. L.F. 255, 261 (quoting Comment, 28 U. CHI. L. REV. 664, 687 (1961).

180. *See supra* notes 10 and 179.

181. Zurcher v. Stanford Daily, 436 U.S. 547, 555-59 (1978). *See also supra* note 102.

volved, the Court must demand particularity in the application for the warrant and precision in its execution. The Court must be sure to limit the resulting intrusion to areas necessary to effectuate the search. No search should be allowed to intrude upon more than the proprietary interests of the occupants since that is the extent of a search warrant. The plethora of privacy rights having little or nothing to do with proprietary interests mut be protected. Since *Summers* invades these non-proprietary privacy interests, the *Summers* detention should not be permitted. If, however, the Court feels compelled to allow such a detention, *Summers* must be cautiously applied to avoid the unnecessary relinquishment of personal rights and to promote fundamental fourth amendment protections.

## THE NECESSITY FOR DEFINITE GUIDELINES

To cautiously apply any law, standard or rule, and to apply it consistently, there must be definite guidelines. In the case of detentions, definite guidelines which recognize the right to stop and question suspects will better protect citizens' rights while limiting the discretion of police officers.[182] Since the *Summers* decision fosters potentially long detentions unsupported by probable cause or reasonable suspicion, definite guidelines should be considered.

There is a continuing debate in many states as to which type of guidelines is more appropriate for a detention—definite guidelines or "the reasonable man"-type guidelines. These discussions have focused on the *Terry* investigatory stop rather than on the *Summers* detention since Summers is an extremely recent decision. Yet, both situations concern the detention of a suspect. Both situations require the right to be free from "unreasonable seizures". Both balance the right to detain suspects for investigation against the suspect's rights of privacy and liberty. Moreover, the Supreme Court in *Summers* justified its detention strictly on the minimalness of the resulting intrusion upon the citizen's privacy[183]—an exception explicitly established in connection with the investigatory stop.[184] Since the two situations

182. Possibly, the Supreme Court is not the agency to tell the police what they can or cannot do. A more suitable agency of government for providing the police with legal guidelines is the legislative branch. They could establish commissions, appoint committees, conduct studies, or hold hearings. The legislature has the tools to promote policy and practicality, unaffected by the shocking facts of an isolated case.

183. *See supra* note 139 and accompanying text.

184. "In the first such case, *Terry v. Ohio*, the Court recognized the narrow authority of police officers to . . . make limited intrusions on an individual's personal security." Michigan v. Summers, 452 U.S. at 698 (citation omitted).

are so analogous as regards the actual detention aspect, guidelines applicable to one should be applicable to the other. As there have been no discussions concerning guidelines for a *Summers*' detention, the discussion concerning investigatory stop guidelines will be analyzed and applied to *Summers*.

Five states[185] have enacted detention statutes which place definite limits on the duration of an investigatory detention. These statutes vary from a maximum detention of thirty minutes,[186] to one of four hours.[187] Approximately fifteen states have adopted detention statutes which only require the detention to be "reasonable."[188] The rest of the states have remained silent on the subject. A few prominent legal organizations have drafted proposed guidelines for detention statutes.[189] In 1942 the Interstate Crime Commission proposed the Uniform Arrest Act.[190] It provides for a total period of detention not to exceed two hours.[191] In 1966, the American Law Institute proposed the Model Code of Pre-Arraignment Procedure.[192] Under this code, when detaining persons for investigatory stops, the police may hold the suspect no longer than twenty minutes.[193] These proposals, however, have not yet been widely accepted.[194] But given such a substantial difference in the set time limits, the question which immediately arises is whether a twenty minute detention and a two hour detention can both be valid under the fourth amendment.

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185. *See supra* note 61.

186. *See* MONT. REV. CODES ANN. § 46-5-402(4) (1979) and NEV. REV. STAT. § 171.123 (1979).

187. *See* N.H. REV. STAT. ANN. § 594.2 (1974).

188. *See supra* note 61.

189. The Interstate Crime Commission proposed the Uniform Arrest Act in 1942. In 1966, the American Law Institute proposed the Model Code for Pre-Arraignment Procedure.

190. The Uniform Arrest Act, *reprinted in* Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-47 (1942).

191. *Id.* at 344, Uniform Arrest Act § 1(3).

192. The Uniform Arrest Act and the Model Code of Pre-Arraignment Procedure both allow the police to stop and question any person when the officer has reasonable grounds to suspect that such person is committing or has committed a crime. The Model Code goes one step farther and also allows a stop based upon reasonable suspicion that such person has knowledge which may be of material aid to the investigation of a crime. This clause adds significantly to the investigation stage of police work since it allows for the detention and questioning of potential witnesses.

193. MODEL CODE § 2.02 (1) and (2) (Tentative draft No. 1, 1966), *cited in* LaFave, *"Street Encounters"*, *supra* note 57 at 44-45, n.22

194. The I.C.C. Uniform Arrest Act has been adopted, at least in part, by three states: *See* DEL. CODE ANN. tit. 11 §§ 1901-12 (1953); N.H. REV. STAT. ANN. §§ 594:1-25 (1955); R.I. GEN. LAWS ANN. §§ 12-7-1 through 12-7-13 (1956). The ALI Model Code for Pre-Arraingment Procedure's suggested time limit of twenty minutes has not been adopted by any states.

The propriety of a statutorily prescribed time period is open to question. A "prescribed time period" is the maximum allotted time that an officer has to question a suspect concerning the suspicious circumstances. In a valid *Terry* stop the time period would run from the time of the initial contact to a point where the suspect must be arrested or must be free to leave. In a *Summers* detention the time would run from the execution of the warrant to the time when the occupant would be free to leave the premises. This is true because the actual detention of the occupants is no more than a "stop" which takes place in a house rather than on the street. It should be noted that after the allotted time in *Summers*, the occupant would be free to leave but the officers could still continue with a "reasonable" search.

The most common argument opposing a set time period is that every case is not readily adaptable within one specific time frame. "A detention does not automatically become 'unreasonable' because of the passage of time."[195] The argument continues that to be proper, the investigation must only be carried on with "due diligence."[196] A second and similar argument emphasizes the importance of having enough time for a thorough investigation.[197] Since a set time period applies uniformly to all detained persons, a problem arises when a number of witnesses or suspects are involved. The time period for dealing with one person may be unreasonably short when there are many. When this set time period expires, the officer is forced to make a difficult decision. He can either charge the suspect at the risk of the suspect being innocent or he can release a possibly guilty person. The implications are that society has a choice between condemning the innocent or suffering from the continued atrocities of the unconvicted guilty.[198] These arguments, when taken together, might persuade some people to oppose demands for definite time limits. Yet,

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195. LaFave, *Detention For Investigation By The Police: An Analysis of Current Practices*, 1962 WASH. U.L.Q. 331, 353.

196. BLACK'S LAW DICTIONARY 411 (5th ed. 1979) defines "due diligence" as "a measure of prudence, activity, and assiduity . . . not measured by any absolute standard, but depending on the relative facts of the special case." Theoretically, the standard would appear to be sufficient. Practically, however, the standard is vague enough to authorize arbitrary police power.

197. Whether referring to a *Terry* stop or a *Summers* detention, "investigation" in this context refers to the questioning of the suspect and not the search of the premises.

198. This second argument has no real bearing on a *Summers* detention if the officers are permitted to search the premises without having to question the detained occupants. If, however, the detention follows *Terry* standards as it logically should, the officers will face the same problem of having to question a number of suspects within a definite time period.

when these arguments are closely examined, they reveal the necessity for such definite time limits.

It is true that every case is not readily adaptable to a specific time frame. But the difference between a definite, prescribed time standard and an objective standard will not appear in every case. It is fairly obvious that in a "reasonable" search, the two standards will be exactly the same up to the point established by the statute. Thus, there is no need to discuss the detentions that are shorter than the prescribed time period since the propriety of these detentions is not affected by the type of time standard used. Instead, the focus of the discussion should be on the cases that exceed the statutory time limit since the propriety of these detentions might be affected by the type of standard in operation.

Critics of the prescribed time period might argue that such a prescribed period is improper since a detention does not automatically become "unreasonable" by the passage of time.[199] Yet, the proponents of the set time period do not suggest that a violation of the time limit automatically renders the stop constitutionally "unreasonable." Rather, exceeding the time limit automatically renders the stop violative of state law. In the five states that already have prescribed detention statutes, it is important to notice that the time limits themselves are always qualified. The statutes start by delineating that the detention may only last long enough to obtain the suspect's identification and to question the suspect concerning the suspicious circumstances. The statutes then add that in no event is the duration to exceed the established time limit.[200] The "unreasonableness" of the detention hinges on the questioning rather than on the time limit per se. The time limit is only a manifestation

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199. Mr. LaFave suggests that under a definite time standard, detentions will be declared "unreasonable" solely on the basis of the time element. He attempts to counter this notion by saying a stop "does not automatically become unreasonable because of the passage . . . of time." LaFave, *Detention for Investigation By The Police*, 1962 WASH. U.L.Q. 331, 353.

200. *See e.g.* MONT. REV. CODE ANN. § 46-5-402 (1979):

> (2) A peace officer who has lawfully stopped a person under this part may demand of the person his name and address.
>
> (3) A peace officer who has lawfully stopped a person . . . shall inform the person . . . that the stop is not an arrest but rather a temporary detention for investigation, and that upon completion of the investigation, the person will be released unless he is arrested.
>
> (4) After the authorized purpose of the stop has been accomplished or 30 minutes have elapsed, whichever occurs first, the peace officer shall allow the person to go unless he has arrested the person.

of the state's interest in protecting its citizens' rights of privacy, liberty, and autonomy. It is not the ultimate criterion for determining "unreasonableness." The state is simply saying that once a detention exceeds the stated time period there is a stronger interest in protecting these personal rights than in promoting criminal investigation. Even though exceeding the set time limit may not be constitutionally unreasonable it is a violation of state law. Consequently, although a detention exceeds the statutory time limit, it does not necessarily violate the fourth amendment.

Facts amounting to a violation of the fourth amendment will constitute such a violation in every state—regardless of the applicable state statute.[201] In the investigatory stop context, there are only a few circumstances when the fourth amendment will be violated. If the stop is not based on reasonable suspicion the stop is "unreasonable."[202] If the questioning is not related to the circumstances justifying the initial stop the stop becomes "unreasonable."[203] Finally, if the state statute provides an unreasonable length of time for any detention, the statute and the stop are both "unreasonable."[204] States may establish their own time limit standards to further legitimate state interests, and these standards may be more stringent than those embodied in the fourth amemdment. Yet, such standards are still limited by the fundamental standards established by the fourth amendment.

While some states have chosen to establish a specific statutory time period, others have simply designated that the stop can last only a reasonable time.[205] The arguments for such an objective, "reasonable time" standard emphasize the increased crime prevention and detec-

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201. In Hancock v. Nelson, 363 F.2d 249 (1st Cir. 1966), the court stated:

> If a specified length of time is too long to be federally constitutional, it cannot make any difference whether the delay occurred in New Hampshire, where the State statute was violated, or in another state where it was not. In each state, the State courts are, of course, free to attach whatever effects they choose to violations of this kind. But they are not free to attribute such judgments to the requirements of the Constitution of the United States unless an equivalent judgment would be constitutionally compelled in every other state on the same set of facts, no matter what periods were set by the State statute.

*Id.* at 253.

202. *See* Terry v. Ohio, 392 U.S. 1 (1968).

203. *See supra* note 62 and accompanying text.

204. *See supra* note 201.

205. *See e.g.*, ILL. ANN. STAT. ch 38 § 107-14 (Smith-Hurd 1980), "A peace officer . . . may stop any person in a public place for a *reasonable period of time* . . . and may demand the name and address of the person and an explanation of his actions." (emphasis added).

tion made available by the objective standard. While such interests are undoubtedly legitimate, the arguments totally disregard the corresponding privacy interests of the individual. The objective standard creates a problem of arbitrariness—a definitional problem of what is "reasonable." One hour might be reasonable if the stop is carried on with due diligence.[206] The question then arises whether three hours would be reasonable.[207] Five hours?[208] Three days?[209] Theoretically, under an objective standard, a stop could last forever, as long as it was continued with due diligence. The importance of a specific time standard then becomes obvious. Even though "due diligence" is an objective standard it requires the officer's subjective interpretation. Inherent in such subjectivity is the potential for arbitrary and discretionary police power. The crucial point is that the objective standard fosters arbitrary police power—the very consequence the standard was intended to prevent.[210]

A definite time period eliminates a significant portion of this "arbitrariness" by leaving fewer decisions to the discretion of the officer. Inevitably, the set time period will not encompass every possible factual situation. However, a rationally set period will be more than sufficient to cover an overwhelming majority of cases.[211] The rare case

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206. In *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974), the police stopped an airplane and ordered the passengers to disembark. The court held the actions to be valid since further investigation was warranted. When the defendants did not answer legitimate police inquiries, a detention of an hour was not unreasonable.

207. In *United States v. Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1980), defendant was legally stopped, pursuant to informer's tip. But a three hour detention was so similar to an arrest that it could only be justified on probable cause.

208. Harris v. United States, 331 U.S. 145, *reh'g denied*, 331 U.S. 867 (1974). Upon warrants charging mail fraud violations, federal agents searched defendant's apartment for five hours.

209. State v. Swain, 269 N.W.2d 707 (Minn. 1978). Upon the execution of a search warrant for blood stains, the court found a three day search of a house was not reasonable.

210. *See supra* note 22 and accompanying text.

211. Pilcher, *Law and Practice in Field Interrogation*, 58 J. CRIM. L., C. & P.S., 465, 488 (1967). On the basis of about three hundred field interrogations in Chicago, it was reported that the average length of time a citizen was detained by a field stop was between two and three minutes. One person was detained about twenty minutes until the victim of an armed robbery arrived and made negative identification. One driver was detained more than forty-five minutes while a check was being made. This delay occurred on a Friday night while there was a computer malfunction; the person was arrested when it was reported that his driver's license had been revoked. Other than these two instances, a detention did not last over five or six minutes minutes and, of course, the overwhelming majority were much less than that.

In a second test, one-half of the suspects were detained less than ten minutes, while three-fourths of the total were detained less than twenty minutes. Nevertheless,

that is impaired by a set time period will be more than adequately balanced by the overall increase in personal privacy and the elimination of situations where an innocent person is wrongfully detained for an extended period.

Without definite guidelines, the occupants in *Summers* will be forced to surrender their constitutional rights indefinitely. They will lose their right of privacy, their right of liberty, and their right to freedom of movement for as long as it takes the officers to search the house. All of this imposition will occur regardless of their innocence, or "presumed innocence."[212] Opponents of the definite standard overlook this argument by insisting that a "reasonableness" standard gives police necessary discretion in detecting and preventing crime.[213] However, studies have shown that the length of the detention, no matter how long it lasts, will add vary little to the conviction rate of criminals.[214] Personal privacy rights are fundamentally guaranteed by the Constitution and must remain of utmost importance. A definite time standard fosters the protection of these fun-

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five percent were detained for an hour or more before the decision to book or release them was made. It should be noted that these times included instances of questioning on the way to the station and upon arrival. LaFave, *"Street Encounters", supra* note 57, at 98 n.307, *citing* Reiss and Black, *Interrogation and the Criminal Process*, 374 ANNALS 47, 52 (1967).

212. A premise of our legal system is that a man is "innocent until proven guilty."

213. *See supra* note 196.

214. The District of Columbia Metropolitan Police Department was allowed to arrest suspects for investigation and then interrogate them to determine guilt. The Department argued that without this procedure police effectiveness would be severely impaired. The value of the practice was studied by the Commissioner's Committee on Police Arrests for Investigation, in 1961 and 1962. The results were published in the Horsky Report.

The study found that of 1,356 suspects held over *eight* hours, only sixteen (1.2%) were charged. The others were released without any charge after eight hours or more of detention. Of the 690 suspects held over *twelve* hours, only seven (1%) were charged Again, the remainder were released after this prolonged detention without any charge. A statistical breakdown of some of the specific crimes over a two year period reveals that:

> 211 were arrested for investigation of homicide, only 1 was charged;
> 120 were arrested for investigation of rape, only 3 were charged;
> 1,998 were arrested for investigation of robbery, only 51 were charged;
> 1,682 were arrested for investigation of house-breaking, only 67 were charged.

It is fairly obvious that even with detentions as long as twelve hours, the conviction rate is only affected minimally. *Report and Recommendation of the Commissioner's Committee on Police Arrests for Investigation (1962), cited in* Pye, *Supreme Court and the Police: Fact and Fiction*, 57 J. CRIM. L., & P.S. 404, 408 (1966).

damental rights. A "reasonableness" standard, on the other hand, fosters arbitrary police power under the guise of increased crime prevention. But increased crime prevention is a policy consideration, not a constitutional inquiry. Thus, even assuming that a reasonableness standard can substantially promote the crime prevention interest, this policy argument nevertheless cannot pre-empt the explicit constitutional guarantees of personal privacy. Thus, for the sake of personal privacy, liberty and autonomy, definite time standards must be established.

Every detention statute should express a maximum length of detention. It is not essential that every state have the same time limit. The importance is that the statute is concrete enough to give the officer definite guidelines. The statute must balance the need for crime prevention against the individual's personal rights. A thirty minute limit would probably be the most appropriate for maximizing the suspect's privacy rights while still allowing sufficient time for investigation.

Thirty minutes is sufficient to cover the overwhelming majority of situations in which a detention is necessary. Thirty minutes is more than sufficient time to obtain the suspect's identification and to determine whether the suspect can exonerate himself. It also allows ample time to check the identification and the suspect's explanation of his actions. In addition, the existence of a thirty minute time limit would clearly indicate to the officer that the statute is designed to permit only the most minor detentions. It could not be construed as a tacit authorization to take the person into custody while further investigation is in progress.

Anything longer than thirty minutes is hard to reconcile with the "briefness" requirement of a stop. Since the word "brief" is too vague to be used as a standard, a specific time will define "brief" and give the officer a definite understanding of how long he may hold a suspect. A thirty minute time limit would also eliminate a prolonged detention occasioned by police abuse. If an officer decided to hold the suspect for the full time allotted by the statute, the resulting one-half hour detention would still be a relatively minor invasion of one's right to free movement and freedom from unreasonable intrusions. Thus, a thirty minute time limit allows ample time for investigation while minimizing the instrusions on personal privacy.

The privacy rights involved in a *Summers*-type detention are as constitutionally viable as the rights triggered in an investigatory stop. In fact, the analogous nature of the *Summers*' detention and the *Terry*

stop suggests that the same balance of order and freedom is involved in both situations—the right to detain suspects for investigations as oppposed to the suspects' rights of privacy, liberty and the right to be free from "unreasonable seizures." Thus, the standards applicable to *Terry* are applicable to *Summers*. It is recognized that in a *Summers*' situation thirty minutes may not be sufficient to search a house. But, the time limit would be set merely to protect the privacy rights of the occupants, not to curtail the search of the premises. Once the thirty minute time limit is reached, the occupants must be arrested or released, but a reasonable search of the premises may continue. Thus, while thirty minutes may not be sufficient to search a house, it is sufficient time to question the occupants of that dwelling and to permit them to exonerate themselves. A thirty minute standard will eliminate the inequities fostered by an objective standard. Moreover, a thirty minute standard will help preserve established and time-honored fourth amendment principles.

*Conclusion*

The fourth amendment is premised on the need to protect personal privacy and liberty. Prior to the fourth amendment, general warrants and writs of assistance giving the executing officer virtually unlimited discretion were prevalent. To combat this unlimited discretion and arbitrariness and the ensuing intrusions upon personal privacy, the fourth amendment requires a showing of probable cause before the issuance of any warrant. A warrant to search a location for contraband must be based upon probable cause that the contraband is located on the premises. *Summers* suggests that this probable cause also authorizes the detention of the occupants of those premises. But a search warrant is only based upon the location of the contraband. It is not based upon probable cause to believe that the occupants are engaged in illegal activities or are necessarily connected with the named contraband. Thus, a search warrant which does not mention or describe a particular person should not authorize a detention and subsequent arrest of that person.

The Supreme Court has recognized an exception to the probable cause requirement—the investigatory stop. The elements of an investigatory stop are clearly enunciated in case law. The stop must be based upon reasonable suspicion that a crime has been committed and that the suspect has some connection with the criminal activity. Secondly, the questioning pursuant to a stop must be limited to inquiries designed to allay the officer's suspicion concerning the suspect. Finally, for the past thirteen years, the Supreme Court, has held

"briefness" to be the standard for determining the duration of a stop. The Supreme Court obviously felt that a definite time standard was unnecessary since the stop could be adequately supervised by the courts to insure fourth amendment privacy rights. Thus, the Court has never set a definite time standard for this limited exception to the probable cause requirement. But judicial times have changed. This one limited exception is being used as a stepping stone for new probable cause exceptions with far-reaching ramifications. If the Court is to stop this "stepping-stone" syndrome and its potential onslaught of the probable cause requirement, it must start while probable cause is still the rule. It cannot wait until numerous exceptions change the rule itself into an "exception."

Any exception to, or modification of, probable cause as is related to detentions must start with *Terry*, because *Terry* was the first such recognized exception to the probable cause requirement. Thus, standards established in *Terry* would be applicable to modifications covering the same subject matter. If definite time limits were set on the detention aspect of a *Terry* stop, future modifications regarding the duration of any detention, as in *Summers*, should be required to follow *Terry*. This is not to suggest that every detention statute must be identical but the underlying standard should be comparable. The statute must balance the opposing interests of order and freedom; justifying any detention upon some particularized interest apart from the general police interest in discovering evidence and apprehending wrongdoers. The statute must also precisely state the requirements for a detention in order to furnish fair guidelines for police and citizens, to promote consistency in judicial interpretation, and to avoid the unnecessary relinquishment of personal privacy and liberty rights.

To insure the continuity of the fourth amendment's time-honored balance of order and freedom, the Supreme Court or the legislature must re-examine the *Summers*' decision. The decision as written is too vague to provide its own guidelines and consequently will not safeguard the protections of the fourth amendment. Definite standards must be set as to the duration of the detention, the definition of "occupant", and the proximity of the occupant to the premises. The innate distinctions between search warrants and arrest warrants must also be restored. Moreover, these distinctions must be re-established before the potential ramifications of prolonged detentions and unauthorized searches become reality and the fourth amendment protections of personal liberty and privacy mere verbiage.

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